

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JAMES L. LEMMONS**  
Claimant

VS.

**RYDER INTEGRATED LOGISTICS, INC.**  
Self-Insured Respondent

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Docket No. 1,036,335

**ORDER**

Claimant appealed the October 1, 2012, Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on March 22, 2013, in Wichita, Kansas. E. L. Lee Kinch of Wichita, Kansas, was appointed as a Board Member Pro Tem for purposes of this appeal in place of Board Member Seth G. Valerius.

**APPEARANCES**

Robert R. Lee of Wichita, Kansas, appeared for claimant. Randall W. Schroer of Kansas City, Missouri, appeared for respondent.

**RECORD**

The record considered by the Board consists of the transcript of the September 4, 2012, preliminary hearing, and the pleadings contained in the administrative file. The Board also considered the transcript of the June 15, 2009, regular hearing and exhibit thereto; the transcript of the March 23, 2010, post-award hearing and exhibits thereto; the transcript of the September 15, 2011, deposition of claimant; the transcript of the September 22, 2011, post-award hearing;<sup>1</sup> and the transcript of the October 11, 2011, deposition of Joey Dean and exhibits thereto.

**ISSUES**

This is claimant's second attempt to have the ALJ and the Board order respondent to pay a medical bill expense in the amount of \$9,959.78 incurred on May 21 and 22, 2008,

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<sup>1</sup> It appears any exhibits to the September 22, 2011, post-award hearing transcript are with the original transcript, which is currently at the Kansas Court of Appeals.

at Wesley Medical Center. In 2010, claimant filed an Application for Post Award Medical asking that respondent be ordered to pay the Wesley bill. In that post-award medical proceeding, claimant did not request a preliminary hearing, but proceeded directly to a final hearing. The post-award medical hearing was held on September 22, 2011. In a March 1, 2012, Post-Award Medical award, the ALJ denied claimant's request. The Board affirmed, and claimant has appealed to the Kansas Court of Appeals.

Following the March 1, 2012, Post-Award Medical award, claimant filed two Applications for Preliminary Hearing. A preliminary hearing was held on September 4, 2012, and consisted of oral argument by the parties. Claimant again requested that respondent be ordered to pay the Wesley bill. Claimant argued that K.S.A. 44-534a does not prohibit payment of a medical bill for treatment that was received more than six months prior to the filing of the application for hearing. Respondent asserted payment of the Wesley bill had been previously litigated and was barred by collateral estoppel and res judicata. Respondent requested the preliminary hearing be dismissed. Respondent also contended that a preliminary hearing can only be held prior to a full hearing, and a full hearing was already held in 2009.

In an October 1, 2012, Order, ALJ Barnes denied respondent's motion to dismiss claimant's application for preliminary hearing. The ALJ determined respondent's liability for payment of a \$9,959.78 bill from Wesley Medical Center for May 21 and 22, 2008, dates of service is limited to the statutory limit of \$500, as the bill has been determined to be an unauthorized medical expense.

Claimant appealed and submits that the Board has previously allowed preliminary hearings to occur after the entry of the original award and that the preliminary hearing statute does not contain a provision that medical benefits must be incurred within six months of the filing of the application for preliminary hearing. Claimant maintains the treatment he received should be considered authorized.

Respondent maintains: (1) the medical treatment at issue was never authorized and, therefore, respondent's liability is limited to \$500; (2) the procedure for a preliminary hearing set forth in K.S.A. 44-534a does not permit application for a preliminary hearing after the conclusion of a full and final hearing on the claim; (3) under K.S.A. 44-534a(a)(2), the Board lacks jurisdiction to consider claimant's appeal; and (4) claimant's request for payment of the medical bill is barred under the doctrines of res judicata and collateral estoppel as claimant already filed an application for post-award medical pursuant to K.S.A. 44-510k and the issue was litigated. Respondent requests the Board dismiss claimant's appeal or affirm the October 1, 2012, Order. It also requests attorney fees and expenses.

The issues before the Board on this appeal are:

1. Does the Board have jurisdiction to review this matter?

2. If so, is the issue of payment of the Wesley bill res judicata?

3. Does the Board have statutory authority to order payment of the Wesley medical bill? If so, was the medical treatment on May 21 and 22, 2008, at Wesley Medical Center authorized treatment?

4. If the Board finds in favor of respondent, is respondent entitled to reasonable attorney fees and expenses?

#### **FINDINGS OF FACT**

After reviewing the record and considering the parties' briefs and arguments, the Board finds:

The Board incorporates by reference the facts set forth in its Order of July 31, 2012.

Claimant appealed the ALJ's March 1, 2012, Post-Award Medical award to the Board. In a July 31, 2012, Order, which is on appeal to the Kansas Court of Appeals, the Board concluded:

1. The May 21 and 22, 2008, Wesley medical bill was not addressed in the original award and was not an authorized medical expense.

2. Even if the Wesley medical bill was an authorized medical expense, the ALJ in a post-award medical award does not have authority to order payment of a medical expense incurred by claimant prior to the original Award.

3. The ALJ does not have authority to order payment of a medical expense incurred more than six months before claimant filed his Application for Post Award Medical.

**WHEREFORE**, the Board modifies the March 1, 2012, Post-Award Medical award entered by ALJ Barnes by concluding claimant's medical expenses were not authorized. The Board also modifies the Post-Award Medical award by finding ALJ Barnes did not have authority to order that respondent pay medical expenses claimant incurred prior to the entry of the Award, but presented for payment after the award. The Board affirms the ALJ's Post-Award Medical award in all other respects, including the ALJ's finding that she lacked authority to order payment of the Wesley medical bill in question as it was incurred more than six months prior to claimant's Application for Post Award Medical.<sup>2</sup>

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<sup>2</sup> *Lemmons v. Ryder Integrated Logistics, Inc.*, No. 1,036,335, 2012 WL 3279490 (Kan. WCAB July 31, 2012).

On March 23, 2012, and June 26, 2012, claimant filed Applications for Preliminary Hearing. Attached to both Applications for Preliminary Hearing were demand letters asking respondent to pay the \$9,959.78 medical bill from Wesley that was the subject of the September 22, 2011, post-award hearing.

A preliminary hearing was held on September 4, 2012, which consisted of oral argument to the ALJ by the parties. Those arguments are summarized above. Respondent filed a motion to dismiss claimant's application for preliminary hearing, as it was barred by res judicata and collateral estoppel, as the issue was previously heard, litigated and denied. Respondent requested attorney fees and costs. In an October 1, 2012, Order, ALJ Barnes stated:

6. The Administrative Law Judge finds that the Kansas Court of Appeals has approved the use of the preliminary hearing procedure to determine a claimant's right to medical treatment post award. See *Sieler* [sic] v. *U.S.D. No. 512*, 45 Kan.App. 2d 586 (2011). Accordingly, respondent's Motion to Dismiss Application for Preliminary Hearing is denied.

7. The request for payment of the outstanding medical bill was considered in the claimant's Application for Post Award Medical. The Board ruled that the medical bill was not an authorized medical expense. As the \$9,959.78 unpaid bill has been determined to be an unauthorized medical expense, respondent's liability for payment is limited to the statutory limit of \$500.00.<sup>3</sup>

ALJ Barnes did not order that respondent be paid attorney fees or expenses.

#### **PRINCIPLES OF LAW AND ANALYSIS**

The Board must first consider whether it has jurisdiction to review this matter. K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Did the employee suffer an accidental injury;
- (2) Did the injury arise out of and in the course of the employee's employment;
- (3) Was notice given or claim timely made; and
- (4) Do certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing

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<sup>3</sup> ALJ Order (Oct. 1, 2012) at 2.

order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.<sup>4</sup>

Claimant elected to proceed by filing Applications for Preliminary Hearing pursuant to K.S.A. 44-534a. In his brief to the Board, claimant did not address the issue of whether the Board had jurisdiction to review the preliminary hearing Order of ALJ Barnes. After respondent argued in its brief that the Board lacked jurisdiction to review this matter, claimant did not file a reply brief addressing the Board's jurisdiction.

In *Siler*,<sup>5</sup> respondent sought to discontinue Siler's psychotherapy and filed an application for preliminary hearing. Siler argued that the ALJ did not have the authority to use the preliminary hearing procedure to terminate medical care following the entry of the original award. A Board Member held:

"The preliminary hearing procedure utilized by the ALJ in this instance is appropriate. Additionally, the decision of the ALJ is within her jurisdiction and authority and, thus, not reviewable by the Board at this time. The Preliminary Decision of the ALJ remains in full force and effect and the appeal of the claimant is dismissed."<sup>6</sup>

The Kansas Court of Appeals affirmed the Board's ruling that the preliminary hearing procedure may be used in a post-award medical proceeding. The Court also stated in *Siler*:

K.S.A. 44-534a(a)(2) provides: "Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts." K.S.A. 2010 Supp. 44-551(i)(2)(A) provides that after an ALJ has entered a preliminary order under K.S.A. 44-534a, the Board does not have jurisdiction to review that order unless the ALJ exceeded his or her jurisdiction. Therefore, the Board in this case did not err when it determined that it did not have jurisdiction to review the ALJ's preliminary order. Consequently, this court does not have jurisdiction to review a decision of the Board when the Board did not have jurisdiction.<sup>7</sup>

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<sup>4</sup> See K.S.A. 2012 Supp. 44-551.

<sup>5</sup> *Siler v. U.S.D. No. 512*, 45 Kan. App. 2d 586, 251 P.3d 92 (2011), *rev. denied* 293 Kan. \_\_\_\_ (2012).

<sup>6</sup> *Id.* at 589.

<sup>7</sup> *Id.* at 591.

In *Quandt*,<sup>8</sup> the Kansas Court of Appeals stated:

K.S.A. 44-534a(a)(1) permits an employer or employee to seek a preliminary hearing regarding medical treatment and the payment of temporary total disability compensation before the issuance of a final award. K.S.A. 2006 Supp. 44-551(i)(1) permits appeals to the Board of preliminary awards under K.S.A. 44-534a. However, K.S.A. 44-534a(a)(2), which describes the summary nature of preliminary hearings, only provides for Board review of what it describes as jurisdictional issues, *i.e.*, “a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply.” K.S.A. 44-534a(a)(2) further explains: “Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.”

The Board recognizes an argument can be made that the ALJ's preliminary hearing Order denying the payment of the Wesley bill was a final decision and, therefore, is appealable. The issues of whether claimant suffered an accidental injury, whether the injury arose out of and in the course of claimant's employment with respondent and whether notice is given or claim timely made were not in issue. One could argue the Board has jurisdiction under K.S.A. 44-534a because respondent raised certain defenses, such as *res judicata*. The term “certain defenses” refers to defenses which dispute the compensability of the injury under the Workers Compensation Act. In *Carpenter*,<sup>9</sup> the Court held in syllabus 3:

The term “certain defenses” in K.S.A. 1998 Supp. 44-534a refers to defenses subject to review by the Workers Compensation Board only if they dispute the compensability of the injury under the Workers Compensation Act.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.<sup>10</sup> Pursuant to *Siler* and *Quandt*, the Board does not have jurisdiction to consider this matter. Accordingly, claimant's appeal is dismissed.

Because the Board anticipates an appeal of this claim to the Kansas Court of Appeals, the Board considers it prudent to consider other issues raised by claimant and respondent.

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<sup>8</sup> *Quandt v. IBP*, 38 Kan. App. 2d 874, 877-878, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008).

<sup>9</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

<sup>10</sup> See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

Respondent asserts that even if the Board does have jurisdiction, the issue of payment of the Wesley bill is res judicata. In *Scheidt*,<sup>11</sup> the Kansas Court of Appeals held that a workers compensation award is in most respects like a court judgment and subject to res judicata. Issues necessarily decided in determining the award may not be relitigated unless specifically provided for by statute. In *Scheidt*, the parties agreed to a settlement based upon a written stipulation that Scheidt had a whole body functional impairment. Scheidt filed an application for review and modification asking for a work disability award. Respondent countered by asserting Scheidt had a scheduled injury, not a whole body impairment. The Court of Appeals held that the issue of Scheidt's functional impairment was res judicata, noting that there was nothing in the Workers Compensation Act that permitted the nature of Scheidt's disability to be relitigated in a modification proceeding.

In *Hughes*,<sup>12</sup> two separate claims were filed by Hughes, one for a back injury and the other for bilateral upper extremity injuries. Hughes alleged both injuries were caused by repetitive work activities during the same period of time. After the ALJ issued an award in the back injury claim, a separate award was issued by the ALJ in the bilateral upper extremity injury claim. Respondent appealed the bilateral upper extremity injury award. The Board determined the ALJ had no jurisdiction to decide the second claim because it arose out of the same repetitive series of accidents and, therefore, was res judicata. The Kansas Court of Appeals affirmed the Board's Order.

In *Bazil*,<sup>13</sup> the Kansas Court of Appeals stated:

Similar to a modification hearing, a hearing regarding post-award medical benefits under K.S.A. 44-510k is not a proper proceeding to attack the original award. K.S.A. 44-510k(a) states, "The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary *to cure or relieve the effects of the accidental injury which was the subject of the underlying award.*" (Emphasis added.) Administrative bodies, such as the ALJ and the Board, are dependant upon authorizing statutes and may only exercise authority outlined by the statutes. See *Legislative Coordinating Council v. Stanley*, 264 Kan. 690, 706, 957 P.2d 379 (1998). A plain reading of K.S.A. 44-510k makes clear that at the post-award medical benefits stage, the work-related nature of Bazil's inflammatory arthritis was already established by the original award, and neither Detroit Diesel, the ALJ, or the Board may undermine that finding.

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<sup>11</sup> *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, 42 Kan. App. 2d 259, 211 P.3d 175 (2009), *rev. denied* 290 Kan. 1095 (2010).

<sup>12</sup> *Hughes v. State of Kansas*, No. 107,108, 2012 WL 3290020 (Kansas Court of Appeals unpublished opinion filed Aug. 10, 2012).

<sup>13</sup> *Bazil v. Detroit Diesel Central Remanufacturing*, No. 99,613, 2008 WL 5401467 (Kansas Court of Appeals unpublished opinion filed Dec. 19, 2008).

Claimant previously litigated payment of the Wesley bill in a post-award medical hearing before the ALJ on September 22, 2011, and at oral argument to the Board on June 15, 2012. In that litigation, claimant chose to proceed to a final hearing under K.S.A. 2007 Supp. 44-510k and not to file an application for preliminary hearing under K.S.A. 44-534a. The ALJ's March 1, 2012, Post-Award Medical award was a final award regarding the Wesley bill. Claimant seeks to take a second bite of the apple, and avoid the limitations of K.S.A. 2007 Supp. 44-510k(b), by proceeding under K.S.A. 44-534a. K.S.A. 2007 Supp. 44-510k(b) does not give an ALJ authority to award benefits for medical treatment that was provided more than six months prior to the filing of the application for post-award medical. The Board finds that *Scheidt*, *Hughes* and *Bazil* are controlling. Accordingly, the Board grants respondent's motion to dismiss because claimant has already litigated payment of the Wesley bill and relitigation of that issue is barred by res judicata.

If the Board had jurisdiction to review this matter and it was not res judicata, the Board would find the disputed medical treatment was never authorized and, therefore, respondent's liability is limited to \$500. The Board's analysis is set forth at pages six and seven of its July 31, 2012, Order, which is incorporated by reference herein.

The Board finds no statutory authority requiring a respondent in a post-award medical proceeding to pay a medical expense incurred prior to the original Award, but not submitted for payment until after the Award was entered. Here, claimant is not seeking any additional medical treatment, but rather is now asking that a medical expense incurred 16 months prior to the award be paid by respondent.

At the preliminary hearing and in its brief to the Board, respondent requests that its attorney fees and expenses be paid by claimant. The Board finds claimant did not frivolously file his Application for Preliminary Hearing. Claimant made a good faith effort to be reimbursed for a medical expense that was not submitted to respondent prior to the Award.

As stated in its July 31, 2012, Order, the Board understands and empathizes with claimant. However, the hands of the Board are tied by the facts in this matter, statutory law and case law.

### CONCLUSION

1. The Board does not have jurisdiction to review this matter.
2. If the Board had jurisdiction to review this matter, the issue of payment of the Wesley bill was previously litigated and is barred by res judicata.
3. If the Board had jurisdiction to review this matter and the issue of the Wesley bill was not barred by res judicata, ALJ Barnes had no statutory authority to order payment of



the Wesley bill as authorized medical treatment. The medical treatment incurred by claimant on May 21 and 22, 2008, at Wesley Medical Center was not authorized medical treatment. Therefore, ALJ Barnes correctly ruled that respondent's liability was limited to \$500 for unauthorized medical treatment.

4. The Board finds respondent is not entitled to attorney fees and expenses.

**WHEREFORE**, the Board dismisses claimant's appeal for lack of jurisdiction.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June, 2013.

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BOARD MEMBER

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BOARD MEMBER

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